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RESEARCH ARTICLE

The Expressive Dimension of Free Exercise

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Abstract

Expressivist theories of law focus not only on what legal arrangements do but also what they communicate. The expressivist view has gained special currency in the context of religious establishment. Even when governmental involvement with religion is not coercive or does not materially violate anyone's rights, it may nevertheless be undesirable by virtue of expressing a preference for a certain religion or a privileged status for certain religious groups over others. The existing literature, however, lacks an equivalent expressivist analysis of the related but distinct domain of free exercise of religion. What is expressed when a religious individual or group is granted special relief from the legal requirements that would otherwise apply to them? I argue that just like religious establishments, religious exemptions not only implicate rights and material interests but also have important expressive dimensions that both help account for their value and impose limits on their desirability.

Keywords: religion; free exercise; exemptions; expression; social meaning

One of the hallmarks of the Supreme Court's stridently conservative turn in recent years is the consistency with which the court has ruled in favor of religious petitioners.[1] The conservative justices' favorable disposition to religion,[2] combined with their willingness to revise or entirely overhaul precedent in this area has resulted in the court hearing at least one blockbuster religion case in each recent year, and sometimes more. In particular, prominent religious accommodation cases such as *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,[3] *Fulton v. City of Philadelphia*,[4] and *Burwell v. Hobby Lobby*[5] have grabbed headlines and raised the salience of religious exemptions from the law as an issue for many Americans who had previously given it little thought.

Discourse on religious exemptions often takes a common form: an asserted right of religious liberty is pitted against the costs of exempting some group of persons from the law.[6] A religious petitioner claims a right (under the Free Exercise clause of the US Constitution or some statutory provision, or both) to accommodation of their religious belief or practice. Objectors to the exemption argue that permitting the accommodation will

[1] Lee Epstein and Eric A. Posner, "The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait," *Supreme Court Review* 2021 (2021): 315–47.

[2] Zalman Rothschild, "Free Exercise Partisanship," *Cornell Law Review* 107, no. 4 (2022): 1067–1135.

[3] Masterpiece Cakeshop v. Colorado Civil Rights Commission, 138 S. Ct. 1719 (2018).

[4] Fulton v. City of Philadelphia, 140 S. Ct. 1104 (2021).

[5] Burwell v. Hobby Lobby Stores, 573 U.S. 682 (2014).

[6] This dynamic is characteristic of many First Amendment claims more generally. Stephanie H. Barclay, "First Amendment Harms,'" *Indiana Law Journal* 95, no. 2 (2020): 331–88.

generate unacceptable harms: for example, couples seeking wedding cakes or opportunities to adopt will suffer discrimination, employees using birth control will be forced to bear the cost. The religious party may respond that the harms are not actually that great or that they are an acceptable price to pay for the protection of religious freedom. The debate thus revolves around deontological claims of right weighed against consequentialist claims of benefit and harm. Jurisprudence mostly tracks this framing, with courts weighing *burdens* on religious exercise against the *interests* advanced by the law.

My overarching purpose in this article is to reveal one way that discourse of this form is incomplete. That discourse is not necessarily unproductive or unimportant, and I do not mean to suggest that it is necessarily irresoluble. But there are important dimensions of religious accommodation that are not captured in the framing of rights versus interests. I suggest that religious accommodation discourse might be enriched by introducing a category of evaluation that has been largely overlooked in the scholarship and jurisprudence of this area. Namely, I examine the *expressive* dimension of religious accommodation. Expressivist theories of law focus not only on what legal arrangements *do* (for example, how they respect or violate rights, how they confer benefits or harms) but also on what they *communicate.* The specific question I explore is: What does the government *say* when it grants or refuses religious exemptions?

Legal theorists have long applied an expressivist lens to various constitutional rights.[7] Over two decades ago, Richard Pildes wrote, "[t]he expressive dimension of governmental action plays a central, but underappreciated, role in constitutional law."[8] The determinative consideration, according to this analytical perspective, is whether the government's act expresses an acceptable or unacceptable message. In the area of religion, expressivist views have been especially influential in the context of religious establishment. Scholars and judges who have adopted this lens have held that even when governmental involvement with religion is not coercive or does not materially violate anyone's rights, it may nevertheless be undesirable by virtue of what it expresses. For instance, a crèche (nativity scene depicting the birth of Christ) placed on the courthouse steps may violate the Establishment Clause simply by sending a message of government endorsement of Christian religious beliefs.[9] At the same time, a crèche in a city park may be acceptable vis-à-vis the Establishment Clause if details of its history or context make it such that it does not convey any such message.[10]

The expressivist approach to the Establishment Clause (captured in the endorsement standard just mentioned) has received ample criticism since it originally gained prominence in the 1980s,[11] and it is not especially favored by the current members of the Supreme Court.[12] But it is well developed and has played an influential role over multiple decades of thinking on the appropriate relationship between religion and government. At the same time, both jurisprudence and existing scholarly literature lack an equivalent expressivist

[7] See, for example, Elizabeth S. Anderson and Richard H. Pildes, "Expressive Theories of Law: A General Restatement," *University of Pennsylvania Law Review* 148, no. 5 (2000): 1503–75; Cass R. Sunstein, "On the Expressive Function of Law," *University of Pennsylvania Law Review* 144, no. 5 (1996): 2021–53, at 2021; Deborah Hellman, "The Expressive Dimension of Equal Protection," *Minnesota Law Review* 85, no. 1 (2000): 1–70.

[8] Richard H. Pildes, "Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism," *Journal of Legal Studies* 27, no. 2 (1998): 725–63, at 760.

[9] County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989).

[10] Lynch v. Donnelly, 465 U.S. 668 (1984).

[11] See, for example, Matthew D. Adler, "Expressive Theories of Law: A Skeptical Overview," *University of Pennsylvania Law Review* 148, no. 5 (2000): 1363–1501.

[12] Richard C. Schragger and Micah Schwartzman, "Establishment Clause Inversion in the Bladensburg Cross Case," *ACS Supreme Court Review* 2018–19 (2019): 21–58, at 27; Kennedy v. Bremerton School District, 142 S. Ct. 2407 (2022).

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analysis of the related but distinct domain of free exercise of religion. This is a regrettable lacuna because religious exemptions not only implicate rights and material interests but also have important expressive dimensions that both help account for their value and impose limits on their desirability. Evaluation of exemptions would be enhanced by taking these dimensions into account. What is expressed when a religious individual or group is granted special relief from the legal requirements that would otherwise apply to them? Whatever is expressed, is it something that government ought to be expressing? Something that government ought *not* to express? In what follows, I lay some groundwork for answering these questions.

Exemptions express a government's endorsement of the liberal principle of religious liberty, its positive valuation of religious commitment, and its own commitment to the social value of pluralism. However, exemptions raise expressive concerns when they show partiality to some religion(s) over others, when they express indifference toward the burdens that exemptions can generate for other parties, or when they convey endorsement of political agendas that are at odds with the government's own expressive purposes. These expressive worries give reason to impose limitations on religious accommodation. Also, the expressivist framework for evaluating religious exemptions highlights problems with the notion, recently prominent in free exercise jurisprudence, that any legal exemption afforded to any class of persons whatsoever for any reason whatsoever must also be extended to religious actors. This so-called most-favored-nation principle of religious accommodation is likely to guide free exercise law in coming years, but I offer some expressive considerations against such an approach.

I focus on religious accommodations in the *judicial* context. Courts are where the most consequential recent debates over free exercise have played out in the United States, and important parts of the analysis below turn on details of judicial reasoning. Some of my conclusions may well apply equally to legislatures and executives, but for the sake of focus I have limited myself to the activity of judges and courts. Also, I am concerned principally with the adjudication of free exercise issues in the United States context. The general claims I advance about the expressive significance of religious accommodation are relevant to any liberal-democratic political system, but because expressive meaning is heavily dependent upon context and background social understandings, the details of how to account for the expressive dimension of free exercise will necessarily vary from place to place.

Expressive Law

Expressivist theories of law emphasize the communicative function of law. In addition to the material things that law *does* (grant powers, establish parameters of acceptable conduct, impose penalties, and so on), law can also communicate certain messages. Law can *say* things, in a manner of speaking. Within the expressivist family, there are different theoretical approaches to how law might take on expressive meaning. For instance, law can convey certain information, including a representation of public attitudes or collective sentiments. For instance, legislation enacted under majority rule conveys to observers the information that a majority of legislative votes were cast in its favor, and that this reflects something about the attitudes held by those legislators (or the constituents whom they represent).[13] Additionally, law is sometimes enacted, at least in part, in order to "make a statement."[14] In such a case, legislators may act with the intention of influencing social

[13] Richard H. McAdams, *The Expressive Powers of Law: Theories and Limits* (Cambridge, MA: Harvard University Press, 2017), 142.

[14] Sunstein, "On the Expressive Function of Law," 2024.

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norms. For instance, the Civil Rights Act of 1964 can be understood as an effort not merely to make material improvements to racial equality in the United States but also to shape norms to socially stigmatize racial discrimination.[15]

Importantly, though, the expressive content of a law or government act is not limited to the information that legislators or officials intend to communicate. Laws may send unintended messages that are independent of their enactors' intentions or even the objective features of the act. These factors are not determinative of an act's expressive meaning because, as Elizabeth Anderson and Richard Pildes put it in their pioneering account of expressive law, "expressive meanings are *socially constructed.*"[16] Acts have expressive meaning at least partially in virtue of how they accord with—or diverge from—background social norms and expectations. The idea of a *social meaning* that is independent of either an act's objective content or an actor's subjective intentions is illustrated well by the valence taken on by the slogan "All lives matter" in recent years. On its own, the affirmation of life's universal value is uncontroversial. In context, however, "All lives matter" has operated as a rejoinder to the "Black lives matter" slogan, and thereby implicitly expresses opposition to the racial justice agenda of the Black Lives Matter movement. This social meaning is expressed by the phrase regardless of the specific intentions of the person who speaks it.[17] Similarly, the expressivist theory of law holds that legislation and other government acts may convey social meanings that are not necessarily identical with the intentions of the officials who vote on the laws or enact the policies.

As mentioned above, the expressivist view of law has been applied extensively in the area of religious establishment.[18] The most famous jurisprudential statement of this view appeared in the 1986 crèche case of *Lynch v. Donnelly.* In an influential concurring opinion, Justice Sandra Day O'Connor argued that the determinative consideration in assessing the display's constitutionality was whether the display conveyed government endorsement of certain religious beliefs. What mattered, to O'Connor, was the *message* that the display would send to observers: "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[19] What matters, again, is not what the government intends, but the implicit privileging of certain citizens that is conveyed by a decision to confer "the prestige of the government"[20] on the religious beliefs those citizens affirm. O'Connor's endorsement test was invoked in subsequent establishment cases, though it has more recently fallen out of favor with the current members of the Supreme Court.

[15] Sunstein, 2044.

[16] Anderson and Pildes, "Expressive Theories of Law," 1525; see also Lawrence Lessig, "The Regulation of Social Meaning," *University of Chicago Law Review* 62, no. 3 (1995): 943–1045.

[17] Lawrence Lessig offers some additional examples. Lessig, "The Regulation of Social Meaning," 952–55.

[18] See, for example, Andrew Koppelman, "Endorsing the Endorsement Test," *Charleston Law Review* 7, no. 4 (2013): 719–25; Andrew Koppelman, *Defending American Religious Neutrality* (Cambridge, MA: Harvard University Press, 2013), 87–96; Paula L. Abrams, "The Reasonable Believer: Faith, Formalism, and Endorsement of Religion," *Lewis & Clark Law Review* 14, no. 4 (2010): 1537–56; Simon Căbulea May, "Democratic Legitimacy, Legal Expressivism, and Religious Establishment," *Critical Review of International Social and Political Philosophy* 15, no. 2 (2012): 219–38; Sune Lægaard, "What's the Problem with Symbolic Religious Establishment?," in *Religion in Liberal Political Philosophy*, ed. Cécile Laborde and Aurelia Bardon (New York: Oxford University Press, 2017), 118–31; Aurélia Bardon, "Christmas, Crescents, and Crosses: When Is Symbolic Religious Establishment Permissible?," *American Journal of Political Science* 66, no. 1 (2022): 255–66; Farrah Ahmed, "What Establishment Expresses," *International Journal of Constitutional Law* 20, no. 2 (2022): 818–43.

[19] Lynch v. Donnelly, 465 U.S. 668, 688 (1984).

[20] *Lynch*, 465 U.S. at 701.

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Discerning the expressive meaning of a government act is, to be sure, no simple task. One available means is to survey the perceptions or reactions of particular actual observers. How do people who witness the display or government act interpret its meaning? Such an approach suffers from multiple problems, though. For one thing, it is impossible comprehensively to survey a public's interpretation of a particular government act. This is an empirical question, "but one for which measurement never would be possible."[21] Actual observers will each interpret a government act on the basis of a different set of presuppositions, history, and knowledge.[22] Their judgments will naturally differ, resurfacing the ambiguity of a given act or display's meaning that gave rise to the observer-oriented approach in the first place. Instead, an expressive evaluation of law must rely on the idealized perspective of a hypothetical observer, which reflects the perspectives of real persons without being reducible to any single one of them. In a 1989 case involving Christmas tree and menorah displays on city property, both O'Connor and Justice Harry Blackmun held that the relevant perspective was that of a "*reasonable* observer."[23] O'Connor analogized the reasonable observer to the "reasonable person" standard from tort law—a hypothetical personification of an ideal of reasonable behavior.[24] The construct of a reasonable observer offers an interpretive vantage that does not hinge on the idiosyncrasies of actual individuals' interpretations, but rather captures the social meaning of the government's display or act.[25] O'Connor maintained that the observer could not be conceptualized as a mere interloper. Instead, she insisted that the perspective of a reasonable observer "must be deemed aware of the history and context of the community and forum in which the religious display appears."[26] If the social meaning that is expressed by an act is determined by the way the act relates to the background norms or customs against which it occurs, then a suitable interpretive perspective must be assumed to have knowledge of those norms and customs.

The Expressive Value of Religious Exemptions

An expressivist evaluation of religious exemptions, then, must estimate the meaning that a reasonable observer would be likely to interpret in the government's accommodation of the religious actor. It must take into account an understanding of background context, history, and political culture. So, what do religious exemptions express? What message do they convey?

One possible answer is that they express nothing. For one thing, religious exemptions from legal obligations are actually a form of government *inaction*—refraining from imposing a requirement. Moreover, to the extent that they involve government action, it is the actions of bureaucrats evaluating and approving claims, which is perhaps too mundane an enterprise to bear expressive meaning. It would be a mistake, though, to conclude that because exemptions are administrative decisions to forego holding some actor(s) to a legal obligation that they are therefore void of expressive meaning. Just as, in criminal law, an individual's omission can constitute an act susceptible to legal regulation or punishment, so government restraint from enforcing obligations can express meaning just as powerfully as when it engages in positive actions.

[21] Erwin Chemerinsky, "Why Justice Breyer Was Wrong in Van Orden v. Perry," *William & Mary Bill of Rights Journal* 14, no. 1 (2005): 1–16, at 4.

[22] Capitol Square Review and Advisory Board v. Pinette, 515 U.S. 753, 779 (1995).

[23] County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 620, 631 (1989).

[24] *Capitol Square Review and Advisory Board*, 515 U.S. at 779–80.

[25] B. Jessie Hill, "Anatomy of the Reasonable Observer," *Brooklyn Law Review* 79, no. 4 (2014): 1407–53, at 1439.

[26] *Capitol Square Review and Advisory Board*, 515 U.S. at 780.

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The key to the expressive meaning of exemptions lies in their discretionary character, at least in the United States. In any political system that strives to adhere to the rule of law, the norm of generality entails a presumption that laws apply impartially to all those who are subject to them. Religious exemptions mark a qualification to this norm, establishing special privileges for certain actors on the basis of their religious beliefs. An exemption of this sort is not merely governmental omission; rather, refraining from enforcing a law that would otherwise be legally binding constitutes a positive act of accommodation. It departs meaningfully from the baseline assumption of uniform obligation under the law. And while exemptions for religious exercise have a long history in the United States, they cannot be understood as a stable component of that legal baseline. In fact, the question of whether government is constitutionally required to extend this kind of special treatment has been a deeply contested and unsettled question in the United States for decades. The Supreme Court has interpreted the Free Exercise Clause of the First Amendment in shifting and self-contradicting ways since the middle of the last century,[27] and constitutional scholarship on this question has been similarly unable to produce a consensus.[28]

Religious exemptions cannot be taken for granted in American law, and therefore they are not merely a component of the background legal norms against which government acts can take on expressive meaning. By contrast, consider the constitutional right to trial by jury. This right is so well established that it is difficult to glean expressive meaning from a state taking any particular criminal defendant to court. It is simply what the state must do. Religious accommodations, on the other hand, have a more thoroughly discretionary character in the contemporary United States—discretion which is exercised variously by legislatures, executive officers, or the judiciary. Consequently, exemptions mark a departure from the presumption of legal generality, and their use has the possibility of distinctive expressive meaning.

One simple expressivist interpretation of religious exemptions might see them as expressing the liberal priority of individual freedom. By acknowledging and accommodating citizens' religious commitments, the government might be affirming the Millian principle that coercion of subjects must be justified by prevention of harm to others and where a religious actor's exercise does not harm others, no coercion is warranted. This interpretation of an exemption's expressive meaning is troubled, though, by the fact that even a general liberal priority of freedom admits of various formulations. How is one to know, for example, whether the government is endorsing John Stuart Mill's harm principle or, instead, John Rawls's first principle of justice, that citizens have an equal right to basic liberties, and that this principle shall take lexical priority over subordinate principles of justice? Is the government's liberal orientation basically utilitarian or Kantian? The objective features of an exemption (conscientious objector exemptions from compulsory military service, or the permission to serve wine to children in ritual contexts, to name just a couple examples), do not point clearly toward one or the other. Reasonable observers could disagree. So, if religious exemptions express a commitment to liberal freedom, they are ambiguous as to the nature of that commitment.

Further, to say that religious exemptions express a commitment to liberty is simply too general a plausible interpretive meaning. Religious exemptions are compatible with substantial legal constraints on liberty. In fact, they are *logically dependent* on constraints on

[27] See, for example, James M. Oleske, "Free Exercise (Dis)Honesty," *Wisconsin Law Review* 2019, no. 4 (2019): 689–744.

[28] For an illustration of one aspect of the dissensus, see Michael W. McConnell, "The Origins and Historical Understanding of Free Exercise of Religion," *Harvard Law Review* 103, no. 7 (1990): 1409–1517; Philip A. Hamburger, "A Constitutional Right of Religious Exemption: An Historical Perspective," *George Washington Law Review* 60, no. 4 (1992): 915–48.

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liberty: there can be no exemption if there is no coercive rule in the first place. And while exemptions alleviate those constraints for particular persons or actors, they do not alleviate the constraints in general. For example, that religious pacifists receive conscientious objector exemptions from the military draft cannot plausibly be interpreted as an affirmation of some general principle of liberty when it implicitly affirms the coerced military servitude of all those draftees not receiving the exemption. At the very least, the messages given by exemptions regarding the general priority of liberty are too mixed to substantiate some single coherent expressive meaning.

Religious exemptions are best understood not as protections of liberty in general, but rather as protections for a certain species of liberty—namely, religious liberty. To exempt an actor from the legal obligations to which they would ordinarily be bound specifically in virtue of their religious commitments is to endorse the priority of religious liberty. It communicates that the government regards freedom of religious exercise as of such high importance that the interests ordinarily served by the law in question must yield. Of course, even this more specific principle may be fleshed out in various ways: are we to understand it as reflecting John Locke's rejection of government's jurisdiction over matters of spiritual concern, or Roger Williams's preservation of the ultimate sanctity of conscience, or even a pragmatic recognition of religious accommodation as a means of mitigating religious conflict (a consideration endorsed by both Locke and Williams)?[29] Even with this ambiguity over conceptual foundations, it is plausible that an observer of legal exemptions for religion would interpret the act as expressing *some* recognizable commitment to religious liberty.

One might be tempted further to suggest that the exemption expresses a positive valuation of religious belief or commitment as a component of individual or collective life. An important strain in American political thought has long followed Alexis de Tocqueville's emphasis on religion's importance as a source of moral and social formation, and as a "mediating institution" within civil society.[30] Others have argued that religious belief is itself a distinctive good in human life,[31] or at least have recognized in the US Constitution's special treatment of religion a commitment to this effect. Andrew Koppelman writes, "In deciding to treat religion as a distinctive human good, even defined in a very inclusive way, the state is taking sides on fundamental matters. Some people think that religion is always worthless and harmful, and the state rejects their views when it accommodates religion."[32] One reason for a government to accommodate religion is that the government believes it to have positive social or individual value. But there is at least one alternative viewpoint which might recommend accommodation of religion even while substantively abhorring it—namely, the civil peace view. On this perspective, religion is a force of great social consequence, capable of generating conflict that could be potentially destabilizing to a society, and any accommodation granted to it reflects mere recognition of this force, independent of any normative valuation. In the recent US context, some have defended exemptions from antidiscrimination laws on exactly this conflict-mitigating basis: even if the religious beliefs are abhorrent, exemptions are a way to "turn down the temperature" of

[29] John Locke, "A Letter Concerning Toleration," in *John Locke: Political Writings*, ed. David Wootton (Indianapolis: Hackett, 2003), 390–436; James Calvin Davis, ed., "The Bloody Tenent Yet More Bloody," in *On Religious Liberty: Selections from the Works of Roger Williams*, by Roger Williams (Cambridge, MA: Harvard University Press, 2008), 167–226; also see Martha C. Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (New York: Basic Books, 2008), 34–71.

[30] See, for example, Paul Horwitz, *First Amendment Institutions* (Cambridge, MA: Harvard University Press, 2013), 174–93.

[31] Kathleen A. Brady, *The Distinctiveness of Religion in American Law: Rethinking Religion Clause Jurisprudence* (New York: Cambridge University Press, 2015).

[32] Koppelman, *Defending American Religious Neutrality*, 26.

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public discourse and moderate potential backlash.[33] So, an observer might reasonably wonder if legal exemptions for religion express genuine positive enthusiasm for religion or a grudging concession in view of religion's undeniable social potency.

This ambiguity is resolved, however, if we recast exemptions' way of valuing religion in terms of a commitment to the principle of *pluralism.* By this, I do not refer merely to the descriptive fact of diversity, but rather to the normative idea that a society *ought* to tolerate and protect a variety of beliefs and ways of life.[34] The value of pluralism is independent of the substantive value of any particular beliefs it encompasses, but rather lies specifically in their diversity and the cultivation of a public order that preserves that diversity. Consequently, one need not specifically endorse religious belief as a good thing in order to defend accommodations for its protection. Some defenders of religious exemptions have championed the value of pluralism as an antidote to what they see as the contemporary left's unsavory insistence on uniform adherence to laws implicating moral values and beliefs. For instance, Ryan Anderson and Sherif Girgis perceive laws enforcing progressive social norms regarding sexuality and gender identity as enacting a "puritan" impulse, where the purpose of the law is to impose the values of the majority unyieldingly on the minority.[35] These laws and their advocates, Anderson and Girgis say, will tolerate no deviation from their progressive orthodoxy, and are eager to use the law to "punish the moral heretic" who does not fall into line.[36] Setting aside the accuracy or reasonableness of this characterization, the "puritan" interpretation of laws affording no exemptions highlights the pluralist view by way of contrast. A government that provides legal exemptions for religious exercise expresses its endorsement of a pluralist commitment to tolerating and protecting a diversity of beliefs and ways of life in the public realm, even when they run counter to the preferences and beliefs of the majority.

A further expressivist read on religious exemptions is best appreciated from the perspective of the person on the receiving end of the exemption. Consider their baseline condition, in which they face a conflict between their faith and the law. Confronted with a legal obligation to perform some action that violates their religious commitments (or to refrain from some action that is commanded by their religious commitments), they will experience both the practical conflict of obligations (what are they do to?) and a deeper conflict of identity and loyalty in recognizing that their deeply felt convictions are not shared—and perhaps are even reviled—by the governing order.[37] Think again of the pacifist who objects to being conscripted into military service. Most immediately, they confront a practical conflict between their moral prohibition on using violent force and their legal obligation to take up arms. Additionally, they may feel some degree of alienation from their political order by virtue of the stark reminder that the dominant political culture does not

[33] Robin Fretwell Wilson, "The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes between Religion and the State," *Boston College Law Review* 53, no. 4 (2012): 1417–1514, at 1431; also see Andrew Koppelman, "Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law," *Southern California Law Review* 88, no. 3 (2015): 619–59; Thomas C. Berg, "What Same-Sex-Marriage and Religious-Liberty Claims Have in Common," *Northwestern Journal of Law and Social Policy* 5, no. 2 (2010): 206–35.

[34] See William A. Galston, *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice* (New York: Cambridge University Press, 2002); Jacob T. Levy, *Rationalism, Pluralism, and Freedom* (New York: Oxford University Press, 2015).

[35] See their contributions to John Corvino, Ryan T. Anderson, and Sherif Girgis, *Debating Religious Liberty and Discrimination* (New York: Oxford University Press, 2017).

[36] Ryan T. Anderson and Sherif Girgis, "Against the New Puritanism: Empowering All, Encumbering None," in *Debating Religious Liberty and Discrimination* 108–206, at 108.

[37] David Golemboski, *Religious Pluralism and Political Stability: Obligations in Agreement* (New York: Routledge, 2022), 119–36.

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share their commitment to nonviolence. If we assume a democratic form of government, the fact that the country requires citizens to serve in the military indicates that pacifists are a politically weak minority. On a matter of such deep importance, they may even feel out of place, as if they do not fully *belong* within the political community. This conflict of belonging becomes all the more severe if we consider the layers of ethnic, cultural, and linguistic difference that often mark members of minority religious groups as "outsiders" to the body politic. A legal exemption not only resolves the practical dilemma of action, but also sends a message to the exempted person that while their beliefs are not regarded as publicly authoritative, they are at least sufficiently recognized and respected to warrant protection. The exemption does not resolve the complex of conditions that might alienate a person from their political society, but it can assure them of their standing and help to ameliorate the feeling that their religious identity is at odds with their political belonging. Their deepened attachment to their political system may have beneficial subsequent consequences for social cohesion and political stability.[38]

One thing that the expressivist lens adds to other predominant ways of theorizing exemptions is that it provides reasons for valuing exemptions that apply not only to exempted persons or groups, but also to third party observers. I myself may, at this moment, have no need for a religious exemption, as no extant law burdens my religious practice. Nevertheless, my attachment to my system of government may be strengthened by its expressive endorsement of principles that I value (religious liberty, pluralism), and by the reassuring knowledge that if I were to find my religious commitments in conflict with the law, the political system would be inclined at least to consider extending an exemption to me as well. An expressivist view of religious exemptions does not discount the value of exemptions for their recipients, but recognizes the additional value of exemptions for all those who are in a position to observe them.

To summarize, I have identified three potential expressive meanings in religious exemptions, each of which helps account for their value in a liberal political order. First, exemptions express a commitment to religious liberty. Second, they express a commitment to a normative principle of pluralism. Third, they express a message of belonging and inclusion to their beneficiaries. I have focused primarily on teasing out these expressive meanings of religious exemptions as the scope of this article precludes a more developed argument for their desirability. But I note that insofar as religious liberty, normative pluralism, and inclusive citizenship are political goods—and I believe that they are—then these expressive qualities of religious exemptions count as pro tanto reasons in favor of offering at least some such exemptions.

Expressive Concerns

At the same time, religious exemptions may have expressive features which raise concerns that will usually count against their desirability. Three concerns, in particular, are worth attending to: expression of partiality among religions, expression of lack of concern for the harms caused by religious practice, and expression that lands at cross-purposes with other government expression. Each of these concerns arises primarily from the perspective of third-party observers—that is, not from the perspective of the exempted person(s) themselves—and each implies some parameters that ought to govern the availability and administration of religious exemptions.

[38] Golemboski, *Religious Pluralism and Political Stability*, 139–42.

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Partiality among Religions

To return briefly to the Establishment Clause context, Sandra Day O'Connor's primary concern regarding government acts that convey endorsement of religious beliefs was that they could undermine civic equality by placing a governmental "stamp of approval" on certain religious beliefs.[39] This would lend a certain privileged status to those beliefs and also those who adhere to them while implicitly denigrating alternative religious beliefs and their adherents. In similar fashion, religious exemptions can raise concerns of governmental partiality toward certain religions when some beliefs are accommodated by legal exemptions and others are not. Of course, partiality in the administration of exemptions is not a *necessary* feature of a religious accommodation regime. But given the highly discretionary character of exemptions in the American political system, it is entirely likely that certain religious beliefs might receive more favorable treatment than others.

A set of recent Supreme Court cases illustrates this possibility well. In 2019, the court heard two cases brought by prison inmates who were facing execution. Each requested permission for their chaplain or spiritual advisor to be present in the execution chamber. In the first case, the court denied the request of a Muslim inmate in Alabama;[40] in the second case, only a few weeks later, the court issued a stay of execution for a prisoner in Texas so that he could have a Buddhist adviser present.[41] Though the court explained the discrepancy in procedural terms (the Alabama petitioner had raised his concern too late), many observers could not help but wonder how these two cases could have different outcomes when the only salient difference between them was the religious identity of the petitioners.[42] Adding to the perception of religious favoritism was the fact that while the state of Alabama excluded the Muslim imam, it would have permitted a state-employed chaplain to be present—but the state employed only a Christian chaplain. The Supreme Court's majority did not raise any objection to this practice. Even careful watchers of the Court were perplexed by the pair of cases, and many were concerned about the appearance that the court was sanctioning—or even engaging in—differential treatment of religions.

Ordinarily, the court is not confronted with such similar cases in such chronological proximity, such that the only variable factor differentiating them appears to be which religion is involved. As a result, there will usually be fewer occasions to compare the court's treatment of religion A versus its treatment of religion B. Nevertheless, there is evidence that Christian petitioners have tended to fare better before the court than do non-Christian petitioners.[43] Add to this an awareness of the predominantly Christian makeup of the court, especially among the conservative members who tend to rule for religious petitioners, and an observer would be within the bounds of reasonableness to interpret it as expressive of a general preference for Christianity. In other words, the very same concern that O'Connor raised in response to public religious displays that makes religious faith "relevant … to a person's standing in the political community."[44]

An objector might return to the point that partiality toward certain faiths is not a problem intrinsic to the idea of religious exemptions, but rather only for a religious exemption regime that happens to be administered in a partial or discriminatory manner.

[39] The specific phrase comes from *Engel v. Vitale*, 370 U.S. 421, 428 (1962).

[40] Dunn v. Ray, 139 S. Ct. 661 (2019).

[41] Murphy v. Collier, 139 S. Ct. 1475 (2019).

[42] See, for example, Nina Totenberg, "Supreme Court Sees 2 Similar Death Penalty Questions Very Differently," NPR, March 30, 2019, https://www.npr.org/2019/03/30/708238203/supreme-court-sees-2-similar-death-penalty-questions-very-differently.

[43] Meredith Abrams, "Empirical Analysis of Religious Freedom Restoration Act Cases in the Federal District Courts Since Hobby Lobby," *Columbia Human Rights Law Review Online* 4, no. 1 (2019): 55–88.

[44] Lynch v. Donnelly, 465 U.S. 668, 687 (1984).

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Just as employment discrimination against women is not a mark against employment in general (but rather against *discrimination* in employment specifically), partiality in adjudicating exemption requests is not a mark against exemptions in general. Rather, one could maintain, it is a lamentable failure that highlights the importance of impartiality in this area, but it does not discredit the basic idea of exemptions.

This is true, to a point. Officials charged with deciding to grant or deny exemptions should strive to conduct their business with neither favor nor prejudice toward any particular religious beliefs or traditions. That said, it is also true that the very nature of religious exemptions requires officials to make discretionary judgments that cannot help but take sides in certain matters of religious controversy. For instance, a judge or administrator evaluating a religious exemption request will need to decide whether the faith in question is genuinely religious or whether the law imposes a substantial burden on the petitioner's ability to exercise that faith. Given the varied forms of religious belief and practice, it is quite likely that any individual's judgment on questions such as these will be shaded by the experiences of religion that are familiar to them.[45]

By way of illustration, consider some past judicial treatments of the issue of "burden" on religious exercise. It is uncontroversial that outright coercion—a prohibition on performing some action integral to one's faith, say[46]—constitutes a substantial burden. But other forms of governmental impact on religious exercise are less clear-cut. In the 2014 case of *Burwell v. Hobby Lobby*, the Supreme Court was asked to grant an exemption from the Affordable Care Act's mandate requiring employers to provide health insurance covering contraception.[47] The owners of the Hobby Lobby chain of craft stores objected on grounds that they regarded use of certain contraceptives as a sin, and did not want to be complicit (by virtue of subsidizing) the sinful acts of their employees.[48] A majority of justices accepted Hobby Lobby's claim that the mandate imposed a substantial burden on the owners' religious liberty, but Ruth Bader Ginsburg argued in a dissent that the "evil" which the employers were legally obligated to commit was "too attenuated" to constitute a substantial burden.[49] What is revealing about Ginsburg's dissent is that it highlights the essentially theological judgment involved in evaluating Hobby Lobby's substantial burden claim: Ginsburg was essentially arguing that the Hobby Lobby owners were somehow *wrong* to believe that the contraception coverage mandate was at odds with their religious convictions.[50] Or, in two 1980s cases involving Native Americans, the Supreme Court decided that the objectors' religious beliefs were not substantially burdened by the requirement to obtain a Social Security number, nor by the construction of a road through land regarded as sacred.[51] The court acknowledged that both cases involved government actions that would significantly impact the Native Americans' ability to exercise their religious beliefs as they wished. But, the court held, this does not amount to a substantial burden that should trigger strict

[45] Over three decades ago, Douglas Laycock wrote that "judges are more likely to respond sympathetically to religious claims that are familiar, easily understood, and unthreatening." Douglas Laycock, "The Remnants of Free Exercise," *Supreme Court Review* 1990, no. 1 (1990): 1–68, 14. See also Anna Su, "Judging Religious Sincerity," *Oxford Journal of Law and Religion* 5 (2016): 28–48. See, generally, Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton: Princeton University Press, 2007).

[46] As in, for example, *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

[47] Burwell v. Hobby Lobby Stores, 573 U.S. 682 (2014).

[48] On complicity claims generally, see Douglas NeJaime and Reva B. Siegel, "Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics," *Yale Law Journal* 124, no. 7 (2015): 2516–91.

[49] *Burwell*, 573 U.S. at 760 (Ginsburg, J., dissenting).

[50] David Golemboski, "Judicial Evaluation of Religious Belief and the Accessibility Requirement in Public Reason," *Law and Philosophy* 35, no. 5 (2016): 435–60.

[51] Bowen v. Roy, 476 U.S. 693 (1986); Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988).

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scrutiny analysis because "In neither case ... would the affected individuals be coerced by the Government's action into violating their religious beliefs."[52] These cases have received heavy criticism for failing to appreciate the distinctive relationship of the Native American plaintiffs to their religious obligations—reflective of what one scholar calls a "dismissive approach to the Native American way of life."[53]

While none of these cases involve *explicit* religious partiality, they illustrate how the court's handling of religious claims can implicitly convey greater receptivity to or concern for some religious beliefs compared to others. Thus, it is especially in light of the majoritarian bias that is likely to inform judicial evaluation of religious claims that the concern of expressive partiality must not be overlooked.

Indifference to Harms of Religious Exercise

All religious exemptions generate burdens on some other party. When the religious pacifist is exempted from military service, some person who otherwise would not have been drafted must place their own life into jeopardy in the exempted person's stead.[54] When a business is exempted from antidiscrimination laws, would-be customers are forced to procure their goods or services elsewhere, potentially at greater cost or inconvenience. Sometimes, the burdens of religious exemptions are less acute, falling not upon specific individuals but across some larger portion of society. For instance, exemptions from drug laws raise society-wide risks of addiction or the ills that can accompany the trade of illicit substances. The increase in risk may be minimal, and effects may never be directly traceable to the exemption. Nevertheless, by extending the exemption, the public order assumes some marginal risk of whatever harm the law was intended to prevent. Even imagining, arguendo, some case where there is absolutely no additional cost imposed on a third-party and no increased risk of negative consequences for the society at large, offering the exemption still creates some administrative burden in its facilitation. Some person(s) must receive the exemption request, evaluate it, make a judgment about its merits, and then take whatever steps are necessary to ensure the exempted person is protected from enforcement of the law in question. Exemptions, therefore, are inherently a *burden-shifting* enterprise: the cost of relieving the legal burden upon the religious person's liberty is the new burden imposed on others by the exemption itself.[55]

That exemptions generate or shift burdens in this way does not imply that they are therefore unjustified. But it does raise the possibility of expressive meanings related to those burdens. Namely, when a government provides religious exemptions, one possible meaning that may be received by observers is an expression of prioritization: of the religious liberty

[52] *Lyng*, 485 U.S. at 449.

[53] Anna Su, "Varieties of Burden in Religious Accommodations," *Journal of Law and Religion* 34, no. 1 (2019): 42–63, at 53. Many others have argued the general case that US courts have failed adequately to protect Native American religious liberty. See, for example, Stephanie Hall Barclay and Michalyn Steele, "Rethinking Protections for Indigenous Sacred Sites," *Harvard Law Review* 134, no. 4 (2021): 1295–359; Kristen A. Carpenter, "Limiting Principles and Empowering Practices in American Indian Religious Freedoms," *Connecticut Law Review* 45, no. 2 (2012): 387–481; and Lori G. Beaman, "Aboriginal Spirituality and the Legal Construction of Freedom of Religion," *Journal of Church and State* 44, no. 1 (2002): 135–49.

[54] Brian Leiter, *Why Tolerate Religion?* (Princeton: Princeton University Press, 2013), 99.

[55] This claim is implicitly at odds with approaches that would distinguish between those exemptions that are burden-shifting and those that are not. See, for example, Leiter, *Why Tolerate Religion?* For reasons of space, however, I do not attempt a full defense here. On the topic, see Michael W. McConnell, "Why Protect Religious Freedom?," *Yale Law Journal* 123, no. 3 (2013): 770–810; Nelson Tebbe, Micah Schwartzman, and Richard Schragger, "When Do Religious Accommodations Burden Others?," in *The Conscience Wars*, ed. Susanna Mancini and Michel Rosenfeld (Cambridge: Cambridge University Press, 2018), 328–46.

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interests of the exempted person over the interests of others who bear the cost of the exemption. The government has determined that lifting a burden on person A's religious exercise is worth the burden that doing so imposes on person B. If this is the message expressed by an exemption, it is reasonable to wonder if it does not imply a more stark prioritization of the status of religious citizens over that of nonreligious citizens.

To be sure, a legal arrangement that benefits some at the expense of others is not inherently an expressive problem. Laws do this all the time: targeted taxes or tax expenditures, preference schemes in hiring or procurement, or (to name a current example) forgiveness of federal student loans. While these may be controversial, they do not necessarily entail expressive contravention of the foundational principles of inclusion or equal citizenship. Additionally, many of the harms generated by religious exemptions will be exceedingly minimal. For instance, in *Wisconsin v. Yoder*, the Supreme Court recognized that exempting Amish families from compulsory schooling age requirements would impose on the rest of society some degree of risk that people exiting the Amish community would be inadequately prepared for independent life in mainstream society. This risk, however, is sufficiently speculative to be outweighed by the religious liberty interest of the Amish families.[56] Many exemptions will fit this description, and it would be unreasonable to interpret them as an expression of government's prioritization of religious interests over nonreligious interests.

What is critical, from an expressivist point of view, is not that government stringently avoid conferring any advantage on religious citizens that entails some new burden on other citizens, but rather that government demonstrably recognize and account for the costs of a given religious exemption and visibly weigh those costs against the exemption's benefits. By weighing the burdens that are generated for third parties against the preservation of religious liberty for the exempted party, government demonstrates that it regards the interests on either side of that balance as legitimate and worthy of consideration. The fact that it must decide in favor of one side or the other is ultimately compatible with an expression of equal concern for all citizens, as long as all citizens' interests are recognized and given their due.[57] To neglect this weighing step in the process of granting religious exemptions would indicate a blithely categorical preference for religious liberty interests, regardless of countervailing harms. It would suggest indifference to the interests of those citizens burdened by the exemption granted to certain religious citizens. Thus, any regime of religious accommodation must incorporate some public method of acknowledging and weighing the harms generated by exemptions.

In the United States, the primary framework for weighing these harms is strict scrutiny analysis. While *Employment Division v. Smith* dispensed with strict scrutiny for neutral laws of general applicability,[58] the court has progressively narrowed that category, amounting to what one scholar calls an "evisceration" of *Smith*'s no-strict-scrutiny rule.[59] Additionally, the Religious Freedom Restoration Act of 1993 re-imposed the compelling interest or narrowly tailored test for all federal laws. Harms to third parties will often arise within the compelling interest portion of that review: for example, exemptions from antidiscrimination laws cut right at the heart of the interest (ensuring equality of access) advanced by those laws. However, some have argued that the form of strict scrutiny review applied in religious exercise cases does not adequately foreground the interests of affected third parties.[60] If

[56] Wisconsin v. Yoder, 406 U.S. 205, 224–26 (1972).

[57] Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), 227.

[58] Employment Division v. Smith, 494 U.S. 872 (1990).

[59] Oleske, "Free Exercise (Dis)Honesty," 731.

[60] Nelson Tebbe, Micah Schwartzman, and Richard Schragger, "How Much May Religious Accommodations Burden Others?," in *Law, Religion, and Health in the United States*, ed. Elizabeth Sepper, Holly Fernandez Lynch, and

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judicial evaluation of religious liberty aims to express a commitment to the norm of equal consideration before the law, it must evince to onlookers that burdens on third parties are part of the calculus—if not from within the strict scrutiny framework, then by some other means.

Expressive Cross-Purposes

One of the starkest evolutions in the legal religious liberty landscape over the past few decades concerns *who* is most aggressive in pushing the envelope of religious accommodation. Lee Epstein and Eric Posner describe this transformation: "The religion clauses of the First Amendment were once understood to provide modest but meaningful protection for non-mainstream religions from discrimination by governments that favored mainstream Christian organizations, practices, or values. … Under the Roberts Court, however, the religion clauses have increasingly been used to protect mainstream Christian values or organizations that are restricted by secular laws or liberal constitutional protections."[61]

Religious exemption requests, in particular, have been leveraged by the right as a new cudgel in culture war battles over vaccine mandates, reproductive rights, sexual orientation, and gender identity. Critics have decried this "weaponization" of religious liberty (and First Amendment freedoms more generally) as an exploitation of constitutional protections for the advancement of political ends.[62]

This political context is an important part of the background context against which the expressive "social meaning" of government acts must be evaluated. When exemptions are granted to parties whose requests are closely linked to broader social or political agendas, the exemption risks giving the appearance of government endorsement of that agenda. That, in itself, is not a problem: governments are in the very business of endorsing (and enacting) political agendas. However, when the law targeted by the exemption has a substantial expressive component of its own, the exemption can muddle the government's intended expression, or even put the government at expressive cross-purposes with itself, simultaneously expressing opposing or contradictory messages.

This concern arises perhaps most clearly in exemptions from antidiscrimination laws. Laws such as the Civil Rights Act of 1964, which confer legal sanctions on certain kinds of discrimination, do more than merely punish noxious discrimination; they also express the state's commitment to the value of equality (with respect to race, gender, nationality, and the like). They communicate the state's condemnation of prejudicial treatment, and, as Cass Sunstein writes, they are "often designed to change norms so as to ensure that people are treated with a kind of dignity and respect that discriminatory behavior seems to deny."[63] Requests for religious exemption from antidiscrimination laws—which have arisen persistently over many decades[64]—ask courts to grant special solicitude to beliefs that run directly counter to those norms. Recently, conservative religious actors have sought exemptions from laws prohibiting discrimination on the basis of sexual orientation, as in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, *Fulton v. City of Philadelphia*, and *303*

I. Glenn Cohen (Cambridge: Cambridge University Press, 2017), 215–29; Tebbe, Schwartzman, and Schragger, "When Do Religious Accommodations Burden Others?"; Micah Schwartzman, Nelson Tebbe, and Richard Schragger, "The Costs of Conscience," *Kentucky Law Journal* 106, no. 4 (2018): 781–812.

[61] Epstein and Posner, "The Roberts Court and the Transformation of Constitutional Protections for Religion," 315–16.

[62] See, for example, Howard Gillman and Erwin Chemerinsky, "The Weaponization of the Free-Exercise Clause," *Atlantic*, September 18, 2020.

[63] Sunstein, "On the Expressive Function of Law," 2044.

[64] See, for example, Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968); Bob Jones University v. United States, 461 U.S. 574 (1983).

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Creative v. Elenis.[65] The religious petitioners in each of these cases won, and while each ruling can of course be explained by its own certain doctrinal logic, it is difficult not to interpret the decisions also in light of non-doctrinal factors: the Roberts Court's general receptivity to religious claimants, the likely sympathy of the court's conservative majority for the religious beliefs in question, and that majority's likely sympathy for conservative political movements in general.[66]

In other words, an observer seeing the court grant these exemptions would be within reason to conclude that the court is intending to convey tacit approval of those religious objections to antidiscrimination laws. In *Masterpiece Cakeshop*, Justice Anthony Kennedy noted this possibility, worrying that granting such exemptions might empower religious proprietors to advertise their discriminatory policies in a way that "would impose a serious stigma on gay persons."[67] Kennedy's concern appears to have been borne out, according to a 2021 study that identified a distinct reduction in US vendors' willingness to serve same-sex couples following *Masterpiece Cakeshop*.[68] The best explanation for this effect, the study's author concluded, is that "the decision led vendors to perceive the social norm as more permissive of service refusal to same-sex couples."[69] This is no mere speculation: conservatives themselves have interpreted rulings of this sort as implicit validation of their movement's objective to resist protection of LGBTQ persons from discrimination. After *Fulton*, the conservative activist Roger Severino wrote in *National Review* that the court was "clearly sending a message." He continued, "By its actions, the Court is saying people with sincere faith-informed understandings of social issues that cut against the grain of secularist thought aren't to be treated as bigots, and the government needs to back off."[70] The expressive effect of religious exemptions for discrimination, it appears, often amounts to directly opposing the norms and values that the antidiscrimination laws themselves are intended to express.

One might object: Why is this a problem? Our constitutional system of government is one of separated powers and a federal structure of multiple levels of authority, within which it is entirely routine for different elements of government to disagree with one another. Why should it be of concern that the Supreme Court expresses a different attitude toward nondiscrimination statutes than the state legislatures who enacted them, or the state executives who enforce them? Sometimes, the court directly invalidates statutes or executive actions, striking them down entirely. Surely it cannot be *worse* for the court merely to affirm the rights of citizens who disagree with those laws?

There is something to this objection: expression at cross-purposes is part and parcel of a multifaceted form of government like the US constitutional system, and judicial disagreement with other branches of government is often warranted. Nevertheless, the expressive dynamics of exemptions are different from those in routine cases of intergovernmental disagreement or judicial review. When a court strikes down a law, it makes what it thinks is an authoritative statement of "what the law is."[71] It rejects whatever purposes—material or expressive—were embodied in that law, or at least subordinates them to some procedural or

[65] Masterpiece Cakeshop v. Colorado Civil Rights Commission, 138 S. Ct. 1719 (2018); Fulton v. City of Philadelphia, 140 S. Ct. 1104 (2021); 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023).

[66] See, for instance, the account given in Linda Greenhouse, *Justice on the Brink: The Death of Ruth Bader Ginsburg, the Rise of Amy Coney Barrett, and Twelve Months That Transformed the Supreme Court* (New York: Random House, 2021).

[67] *Masterpiece Cakeshop*, 138 S. Ct. at 1728–29 (2018).

[68] Netta Barak-Corren, "Religious Exemptions Increase Discrimination toward Same-Sex Couples: Evidence from *Masterpiece Cakeshop*," *Journal of Legal Studies* 50, no. 1 (2021): 75–110.

[69] Barak-Corren, "Religious Exemptions Increase Discrimination toward Same-Sex Couples," 105.

[70] Roger Severino, "Why Unanimity Was So Important in the Fulton Case," *National Review*, June 17, 2021, https://www.nationalreview.com/bench-memos/why-unanimity-was-so-important-in-the-fulton-case/.

[71] Marbury v. Madison, 5 U.S. 137, 177 (1803).

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substantive value that it takes to be of weightier concern. When a court grants an exemption, in contrast, it does not invalidate the law in general. Instead, it permits the government to continue expressing the values implied by the law, while at the same time conferring legitimacy on the political agenda that contradicts those values. Moreover, while exemptions are often framed in minimal terms—that they permit a bare modicum of autonomy for dissenters from the majority view—a court's conferral of legitimacy on religious beliefs that are bound up in social/political agendas does not just preserve space for individuals to live outside of majority norms; it implicates the government in boosting the viability of those heterodox beliefs and patterns of behavior. Laws express values and shape norms; exemptions that convey government endorsement of contrary religious viewpoints muddy the waters and diminish those laws' expressive force.

In cases involving religious exemptions from antidiscrimination laws, there is another interesting expressive consideration that further complicates judicial decision-making. Whereas granting these exemptions can convey approval of discriminatory religious beliefs, many people have also noted that *denying* the exemptions can send a denigrating message about the holders of those beliefs: specifically, that they are reprehensible bigots. Justice Samuel Alito raised this concern from the moment that legal recognition of same-sex marriage became constitutionally mandated. His dissenting opinion in *Obergefell v. Hodges* predicted that that those traditional religionists who dare to articulate their opposition to same-sex marriage "will risk being labeled as bigots and treated as such by governments, employers, and schools."[72] The concern resurfaced in a brief submitted in *Masterpiece Cakeshop* by Sherif Girgis, which argued that a ruling against the baker would "tell him—and all traditional Muslims, Orthodox Jews, and Christians—that acting on beliefs central to his identity is wrong, benighted, even bigoted."[73] Importantly, Girgis insisted that this accusation of bigotry "is a message this Court has *expressly rejected*," pointing to a passage in Justice Kennedy's majority opinion in *Obergefell* that denied any implication that opposing religious beliefs were to be condemned or denigrated.

All of this suggests that there is a sense in which courts face a damned-if-you-do, damned-if-you-don't dilemma with respect to expressive cross-purposes in cases involving religious discrimination. If they grant the exemption, they may convey approval of discriminatory beliefs, undermining the expressive, norm-shaping function of antidiscrimination laws themselves. If they deny the exemption, they may convey denigration of traditional religious convictions, contrary to the Supreme Court's own stated disavowal of that message. The inescapability of this complexity might be taken as a point against weighing expressive considerations at all,[74] but this conclusion goes farther than is necessary. Instead, courts are capable of attending carefully to the expressive dynamics of their rulings, even when these are varied and multifarious, and exercising prudential judgment to do what they can to minimize putting the government at expressive cross-purposes with itself. This may require confronting hard choices, with some degree of inevitable expressive muddle, but the constraints of possibility do not absolve courts of their responsibility to exercise expressive caution.

An illustration of an approach that is sensitive to these multiple expressive dynamics can be found in a New Mexico Supreme Court ruling on a case involving a religious photographers' refusal to photograph a same-sex commitment ceremony.[75] The court rejected the request for accommodation, but a concurring opinion issued by Justice Richard Bosson has

[72] Obergefell v. Hodges, 576 U.S. 644, 741 (2015).

[73] Brief of Amicus Curiae Sherif Girgis Supporting Petitioners at 17, *Masterpiece Cakeshop*, 138 S. Ct. 1719.

[74] See, for example, Steven D. Smith, "Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the 'No Endorsement' Test," *Michigan Law Review* 86, no. 2 (1987): 286–95.

[75] Elaine Photography v. Willock, 309 P.3d 53 (N.M. 2013).

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been highlighted by multiple scholars as exemplifying an approach that manages to affirm the norm of antidiscrimination without doing the expressive harm of condemning objectors like the photographers.[76] Justice Bosson sympathetically analogized the photographers to the Jehovah's Witness students in the famous 1943 case of *West Virginia v. Barnette*, who won the right not to be compelled into speech with which they disagreed,[77] and asserted that "their religious convictions deserve our respect."[78] Nevertheless, Bosson recognized that the state's antidiscrimination law had established a firm norm against the conduct the photographers sought to have protected: "The New Mexico Legislature has made it clear that to discriminate in business on the basis of sexual orientation is just as intolerable as discrimination toward race, color, national origin, or religion."[79] Even while drawing a parallel to racial discrimination that many religious conservatives stridently resist, Bosson's opinion steered clear of denigrating the religious photographers as bigots. As Linda McClain writes, Bosson's opinion "models how to speak respectfully—and with 'neutrality'" about religious beliefs that contravene the norms expressed in law.[80] This kind of carefulness in judicial decision making can minimize the expressive damage of a decision that risks undermining or confusing a government's existing expressive commitments.

The Most-Favored-Nation Standard

One conclusion suggested by the discussions in the preceding section is that *how* judges and courts evaluate free exercise claims has significant bearing on the expressive meaning of their decisions – perhaps even as much as *what* they ultimately decide. Thus, attending to the expressive dimension of free exercise requires us to assess not only outcomes—whether such-and-such exemption is granted or denied—but also the evaluative and adjudicatory frameworks that judges use to reach their decisions.

The expressivist vantage can help shed light on some weaknesses of a newly prominent principle for evaluating free exercise claims: the so-called most-favored-nation principle. On this formulation, a law must treat religious exercise no less-favorably than any comparable secular activity. If the law exempts secular activity, it must also exempt religious activity. Versions of this principle have been in the air for some time,[81] but it has come to prominence in recent cases like *Fulton v. City of Philadelphia*, which held that an adoption agency could not be denied a religious exemption from the city's antidiscrimination ordinance as long as exemptions were available for other purposes; or a string of cases, including *Trinity Lutheran Church v. Comer*, *Espinoza v. Montana*, and *Carson v. Makin*, holding that state policies may not deny otherwise-available public benefits for reason of an entity's religious character.[82] The principle was most directly embraced by the court in a couple of cases that granted religious exemptions from COVID restrictions: *Roman Catholic Diocese of Brooklyn v. Cuomo* and *Tandon v. Newsom*.[83] The expressive concerns raised above helpfully

[76] See Linda C. McClain, *Who's the Bigot? Learning from Conflicts over Marriage and Civil Rights Law* (New York: Oxford University Press, 2020), 181–210; George Thomas, "Religious Liberty, Same-Sex Marriage and Public Accommodations," *Perspectives on Politics* 16, no. 1 (2018): 58–72.

[77] West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943).

[78] *Elaine Photography*, 309 P.3d at 78.

[79] *Elaine Photography*, 309 P.3d at 79.

[80] McClain, *Who's the Bigot?*, 190.

[81] Alan Edward Brownstein and Vikram D. Amar, "Locating Free-Exercise Most-Favored-Nation-Status (MFN) Reasoning in Constitutional Context," *Loyola University Chicago Law Journal* 54, no. 2 (2023): 777–820.

[82] Fulton v. City of Philadelphia, 140 S. Ct. 1104 (2021); Trinity Lutheran Church v. Comer, 582 U.S. 449 (2017); Espinoza v. Montana Department of Revenue, 140 S. Ct. 2246 (2020); Carson v. Makin, 142 S. Ct. 1987 (2022).

[83] *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

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highlight some drawbacks of the most-favored-nation principle, particularly as applied in these pandemic restriction cases.

First, the most-favored-nation standard itself invites a type of analysis that will be highly vulnerable to religious biases. Specifically, the standard requires judges to evaluate treatment of religious exercise against comparable secular activity, where the determination of comparability is itself highly controversial. In *Tandon*, the court stated that "comparability is concerned with the *risks* various activities pose, not the *reasons* why people gather."[84] But the court's efforts to identify secular analogues to religious activity suggest that comparisons of reasons for gathering —and, specifically, the relative *importance* of those reasons—are difficult to exclude from the deliberation. In his *Diocese of Brooklyn* concurrence, Justice Gorsuch objected to restrictions on religious gatherings when many businesses remained open. States like New York "have asserted the right to privilege restaurants, marijuana dispensaries, and casinos over churches, mosques, and temples." This differential treatment, Gorsuch argued, reflects the state of New York's "judgment that what happens [in religious gatherings] just isn't as 'essential' as what happens in secular spaces."[85] In other words, the state failed the neutrality and general applicability standards by failing to treat religion as a sufficiently important domain of activity. Rhetorically, Gorsuch's examples—in addition to restaurants, dispensaries, and casinos, he also names bike shops and liquor stores—seem designed to highlight the frivolousness (the depravity, even) of the activities New York has permitted, compared to its treatment of religion, which it has deemed nonessential. Thus, even in applying a standard that purports to focus on the secular, nonreligious factor of relative risk, Gorsuch's analysis seems implicitly driven by a judgment about the relative importance of religion. This is the type of judgment into which the religious biases of individual judges are likely to exercise some influence.

Second, by insisting on nothing less than the most accommodating available standard of accommodation for religion, the most-favored-nation standard risks conveying disregard for the burdens or harms generated by religious exemptions. The slippage between comparing risk and comparing importance noted just above highlights this point: in fixating on the relative importance of religion in comparison to liquor stores and casinos, Justice Gorsuch allows consideration of risk to drop out of the analysis. But even when applied according to the risk-focused rule stated in *Tandon*, the most-favored-nation framework expresses a level of priority for religious interests that warrants permitting religious exemptions that generate as much third-party or societal harm as any other permitted activity. This apparent indifference to the harms of religious exemptions is illustrated again by Justice Gorsuch in a 2021 case challenging New York's COVID vaccine mandate for health care workers, *Dr. A v. Hochul*.[86] The court rejected the demand for a religious exemption by a 6–3 margin, but Justice Gorsuch applied the most-favored-nation standard in a dissenting opinion. He argued that the vaccine mandate violated the Free Exercise Clause by "prohibit[ing] exemptions for religious reasons while permitting exemptions for medical reasons."[87] The state had argued that permitting religious exemptions would be dangerous because of the high numbers of people who might seek one, undermining the goal of broad immunity in the health care professions. As they are based on mutable and non-empirically verifiable assertions of conscience, religious exemptions may well be more numerous than exemptions based on diagnosable medical necessity.

Gorsuch proposes that the appropriate means of mitigating this problem is not to deny religious exemptions altogether, but to "restrict vaccine exemptions to a particular number

[84] *Tandon*, 141 S. Ct. at 1296 (emphasis added).
[85] *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 69 (Gorsuch J, concurring).
[86] Dr. A v. Hochul, 142 S. Ct. 552 (2021).
[87] *Dr. A*, 142 S. Ct. at 556 (Gorsuch, J., dissenting).

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divided in a nondiscriminatory manner between medical and religious objectors"[88]—in other words, to set a limit to how many exemptions can be tolerated, and split them between people with medical conditions and religious objections. It is true that this proposal would offer some form of public weighing of the harms generated by religious exemptions, but in a manner that is strikingly indifferent to the burdens it would impose on those who would be denied medical exemptions. As one commentator put it, Gorsuch's proposal would "require the forcible vaccination of people with severe allergies to the vaccine in order to make room for those with religious objections."[89] The most-favored-nation standard would, in this case at least, not fail to account for the harms of religious exemptions so much as boldly *embrace* those harms as the price of elevating religion to the highest level of public policy priority.

Finally, the accommodation of religious beliefs that resist compliance with pandemic response measures—whether restrictions on gatherings or vaccine mandates—epitomizes the expressive self-contradiction that religious exemptions can give rise to. Apart from the concrete harms generated by exemptions from COVID rules, granting these exemptions provides a degree of validation for a thoroughly antisocial ideology: that individuals have no public health responsibilities to those around them and no obligation to act on behalf of the common good. Of course, many individuals objecting to COVID rules do not hold such a belief. Nevertheless, it is significant that the anti-vaccine, anti-lockdown crowd has looked to religious exemptions as a lever for pressing their agenda. The goal of that broader movement is thoroughly expressive, even if its core message is not shared universally by the individuals seeking exemptions. The movement strives to oppose the view expressed by the government, that self-restraint and sacrifice are virtues warranted by the needs of more vulnerable members of the community. COVID responses expressed (often explicitly) the view that "we're all in this together." Religious exemptions send the message that we are each on our own. Note the telling contrast with medical exemptions on this point: those are issued for the goal of individual health or well-being, which is an end not inherently at odds with the end served by the law in general.

An objection might arise here. Allowing religious individuals or communities to advance their own beliefs is not equivalent to the government putting its own weight behind those beliefs. In the context of Establishment Clause law, by way of comparison, the Supreme Court has said that government acts that accommodate religious liberty do not necessarily express endorsement of the religious beliefs involved.[90] Even when the government indirectly subsidizes religious activity, the independent choice made by citizens as to how exactly to allocate those funds attenuates the act from the government's endorsement.[91] So perhaps it is too much to say that granting COVID-related exemptions lends government endorsement to the anti-communitarian beliefs motivating them. Here, though, the distinction between legislative and judicial actions is important. When a legislature elects to subsidize or accommodate religious activity, it is reasonable not to impute to the government specific endorsement of the religious beliefs that are accommodated. Whatever validation is conferred upon those beliefs is absorbed within the overall expressive purpose of the legislative act. When exemptions are imposed by a court, in contrast, a new act of discretionary government expression is introduced that is separate from—and potentially contrary to—the government's original expression.

The oppositional bent of certain religious exemptions is not limited to the specific case of COVID restrictions. As Charles McCrary has noted, "The brand of religious freedom that

[88] *Dr. A*, 142 S. Ct. at 557 (Gorsuch, J., dissenting).

[89] Katherine Franke, "What Conservative Justices Talk about When They Talk about Religious Liberty," *Nation*, January 6, 2022, https://www.thenation.com/article/society/supreme-court-religion/.

[90] Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1986).

[91] Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

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conservatives have endorsed in recent years is a deeply antisocial version."[92] The "weaponization" of religious liberty by religious conservatives has brought a new political valence to the entire enterprise of religious accommodation. As conservatives have lost ground in certain social and political contests, they have looked to religious exemptions as a way of "allow[ing] them to participate in society, *on their own terms.*"[93] This context is critical for evaluating the desirability of granting religious exemptions in the present moment. The social meaning of exemptions is different when they are pursued by majority faiths with pervasive influence over public and political culture, as compared to minority faiths with little political or cultural power.[94] However, prevailing legal frameworks for adjudicating exemption requests do not adequately capture this aspect of the phenomenon. The expressivist lens that I have sketched is an attempt to grapple with the full social meaning of religious accommodations in their political and cultural context, including both the material consequences of exemptions and, additionally, what a religious exemption *says.*

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[92] Charles McCrary, "The Antisocial Strain of Sincere Religious Beliefs Is on the Rise," *New Republic*, April 4, 2022, https://newrepublic.com/article/165942/sincerely-held-religious-belief-law.

[93] McCrary, "The Antisocial Strain" (emphasis added).

[94] Paul Gowder explores this dynamic in "Why Majority Religions Should Not Be Accommodated," *Iowa Law Review* 108, no. 5 (2023): 2153–87.

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